Case Summary

Complaint against Office of the Telecommunications Authority and Buildings Department
for impropriety in approving an application for installing a mobile telephone base station

The Complaint

A residential unit adjacent to the complainant's flat was rented for installing a mobile telephone base station ("base station") by a telecommunications service operator. Alleging that the base station was in breach of the stipulation that the unit could only be used for residential purpose, the complainant lodged a complaint with the Office of the Telecommunications Authority ("OFTA") and the Buildings Department ("BD"). However, the installation was eventually approved. The complainant was worried about radiation and fire safety hazards from the base station. He considered that there was impropriety on the part of the departments concerned in approving the application and that they had shirked their regulatory responsibility. The complainant, therefore, lodged a complaint with this Office.

Explanation from Departments

2. **OFTA** indicated that under the existing requirements, an application for installing a base station would be approved so long as it complied with the Telecommunications Ordinance as well as OFTA's requirements that it should not interfere with other radio equipment and that the level of non-ionizing radiation could meet international safety standards.

3. However, OFTA's Guidance Note for Applications highlighted that such installations should also satisfy other relevant statutory requirements. Operators were required to file separate applications with other departments for their specific approval. In addition, if the station was "concealed" such that residents would not be aware of it, OFTA would require the operator to submit a declaration that permission had been obtained from the Owners'

Corporation ("OC"), Owners' Committee or building management office concerned.

4. OFTA explained that due to limited manpower and other resources, it could not conduct site visits for all applications or initiate checks with other relevant authorities. Nor would it require operators to submit information on their applications for approval or waiver with other departments.

5. In this case, OFTA admitted that although base station equipment had been installed in the unit in mid-2003, an application was submitted only in August 2003. Nonetheless, upon receipt of the complaint, OFTA conducted a site inspection and confirmed that the base station had not yet started operation.

6. Upon receipt of the complaint, OFTA had already suspended the application. Later on, the operator proved that the relevant works of the base station had complied with the waiver requirements and local zone planning so that separate applications to BD and the Town Planning Board were not required. The installation was approved in March 2004 by OFTA after technical assessment. OFTA then twice conducted investigation and survey in the unit. The results showed that the level of non-ionizing radiation and technical specifications of the base station met requirements. OFTA, therefore, wrote to inform the complainant of the result.

7. Should any department raise an objection to the installation, OFTA would suspend the application. However, suspension could not be too long as OFTA had no authority to reject an application on the ground that it did not comply with other statutory requirements. Otherwise, it might lead to legal disputes. Moreover, OFTA would not intervene in any dispute between the operator and the OC in respect of the Deed of Mutual Covenant ("DMC").

8. **BD** confirmed after an investigation that installation of the base station under complaint did not involve any alteration of the building structure. So it was regarded as exempted building works not requiring BD approval.

9. BD clarified that while the occupation permit of that building provided

that the unit could only be for residential purpose, on legal advice, BD considered change of the unit into a base station to be not a “material change” prohibited by law. The Department, therefore, would not take enforcement action. The complaint was put on record and a written reply issued to the complainant.

Our Observations

The Investigation

10. This Office had conducted a site visit and sought advice from the Lands Department (“Lands D”), Planning Department (“Plan D”), Environmental Protection Department (“EPD”) and Department of Health (“DH”) for their positions and views on the installation of base stations in residential units.

Radiation Hazards from Base Stations

11. This Office would not comment on the effects of base stations on health because it involves professional medical judgment. It is not an administrative issue within our ambit.

12. To ensure public safety, however, OFTA had drawn up a code of practice for telecommunications service operators for the health and safety of personnel at base stations and residents in the vicinity.

Regulatory Responsibility

13. **Lands D** stated that, in general, a building designated in the land lease for residential use could not be changed for commercial use. However, in the lease of the building in question, there was no restriction on land use. Therefore, the installation had not violated the land grant provisions. **EPD** indicated that it would only exercise control over noise pollution, the thermal and radiation issues associated with the base station were outside its jurisdiction.

14. Unless there was a complaint, **OFTA** would not know whether an

operator had followed the Guidance Note and applied to other departments for approval, or whether its application had satisfied other requirements for waiver. Moreover, the Guidance Note did not state any consequence or penalty for non-compliance. So, even if an operator failed to comply with the requirements of other departments, OFTA might still approve the application in ignorance.

15. This Office noted that legal advice to OFTA had indicated that the court would not object to an authority taking into account the views of other departments when assessing an application. We, therefore, had reservations over OFTA's argument that it had no right to reject an application for installing a base station on the ground of other departments' opinions.

16. This Office also noted that OFTA would require a declaration of consent from the OC or property management company of the building only when a "concealed" base station was to be installed. If the antenna of a base station was installed on the rooftop or the external wall of a building, such permission would not be required. Thus, when no permission from the OC could be obtained, operators might well try to install the antenna on the external wall of the building to get OFTA approval. This Office considered OFTA too cavalier in allowing such situation to happen. It should stop any recurrence.

17. Moreover, the current Guidance Note does not include any reminder to operators to pay attention to any restrictions in the DMC.

Fire Safety

18. Our site visit found the unit, where the base station was located, to abound with wires and electrical devices approved by OFTA and installed by authorised persons. OFTA considered that the arrangement would ensure safety and satisfy the requirements.

19. However, this Office noted that if an operator did not submit its application to BD, the Department could not assess the safety of the building structure and the means of escape. Meanwhile, OFTA would still approve the application. Such administrative arrangements were evidently inadequate safeguard for residents' safety.

Our Conclusion

20. **The Ombudsman** considered that **OFTA** had unduly relied on the initiative of the operators and that the approval process contained loopholes and offered insufficient protection for the public. As the authority for approving base station applications, OFTA should coordinate with the other departments concerned. The existing procedures were clearly inadequate. The complaint against OFTA was, therefore, **partially substantiated**.

21. **BD** had handled the application and complaint in accordance with the Buildings Ordinance and OFTA's Guidance Note. It had not shirked its responsibility. The Ombudsman, therefore, considered the complaint against BD **unsubstantiated**.

22. Overall, the complaint was **partially substantiated**.

Our recommendations

23. The Ombudsman made seven recommendations to OFTA:

(a) to consider improvement to the monitoring and approval process, or to coordinate better with other authorities for approving applications;

(b) to study the feasibility of granting operators "temporary approval" for base stations and introducing penalty to deter operators from installing and operating base stations without authorisation;

(c) to seek legal advice to clarify its powers for rejecting an application;

(d) to step up investigation of suspected cases and conduct site inspections more frequently to ensure compliance with requirements;

(e) to remind operators, in its Guidance Note, of the need to follow Government policy against unauthorised building works and comply with DMCs of buildings;

(f) to examine ways to step up inspection of base stations for compliance with fire safety regulations; and

(g) to enhance publicity through different channels to allay public worry about the safety of base stations.

Response from BD and OFTA

24. **BD** accepted our conclusion and recommendations in the investigation report (as far as they concern BD) and planned to include base stations on rooftops in its proposed "minor works control system". Under the new approval system, operators would not need to apply to BD for approval as long as it followed prescribed procedures. OFTA also agreed that the new system could help resolve the fire safety problem of base stations on rooftops.

25. **OFTA** did not agree to our conclusion that the complaint was "partially substantiated". It stressed that its Guidance Note was not a legal document and could not be enforced against operators. On the other hand, the Guidance Note stated clearly that the operators had an obligation to apply to different departments concerned for approval to ensure that their base

stations meet the requirements of those departments. So the existing arrangements were adequate to ensure the fire safety of a building.

26. OFTA considered that, as the six local operators were all experienced in installing base stations, adding any unnecessary procedures for approval would only impede the construction of base stations and adversely affect the enhancement of network coverage and quality of service.

27. As regards the proposed coordination by OFTA for a “one-stop” service for approval, it claimed that such arrangement would mean a heavy workload for both the operators and Government. Furthermore, OFTA was not in a position to assess whether a base station met the requirements of other departments and, therefore, could not serve as a “gatekeeper”. Moreover, there would not be any radiation hazards or radio interference before a base station started operation, which was why prior approval by OFTA was not required for installation works.

28. In addition, OFTA did not have the authority to assess whether a base station violated other laws, let alone using it as a ground for rejecting an application. OFTA could reject or suspend the application if other departments could produce evidence to prove that a certain flat was not suitable for a base station. Yet, as there was no relevant provision under the Telecommunications Ordinance, OFTA remained concerned that such action would run the risk of judicial review.

The Ombudsman’s Final Remarks

29. **The Ombudsman** considered that OFTA, being the Government’s licensing authority for base stations, should ensure that their installation and operation also meet the requirements of other departments as they are all part of the same Government. It should not disregard the operators’ compliance or otherwise with the regulations of other departments.

30. OFTA’s claim that it could not be the coordinator for the approval procedures did not reflect well on it as a responsible authority. This Office

considered that it should revise its current Guidance Note so that operators would better understand their obligations before applying to operate a base station.

31. Meanwhile, OFTA should seek further legal advice whether it has the powers to reject or suspend an application on grounds of objections from other departments. It could also consider amending its current licensing requirements or issuing legally binding guidelines so as to strengthen regulation.

32. The Ombudsman decided to maintain her conclusion and urged OFTA to implement the above recommendations.

Recent Development

33. OFTA subsequently indicated that it would reconsider the recommendations in our investigation report and confer with other departments how to coordinate the approval procedures, including the development of a "one-stop" shop for approval.

Office of The Ombudsman
October 2005